SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER FOR
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

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No. 968

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In his Motion to Dismiss Appeal Appellee characterizes the judgment below as "an interlocutory determination of venue" and as a "determination of a merely interlocutory step in the proceeding." (Motion, p. 2.) Appellee cites no authority in support of this general conclusion. In the lexicon, "interlocutory" means "provisional, only temporary, not final." *Black Law Dictionary, 3rd ed.; Webster New International Diction-*

ary, 2d ed. By Texas law and practice, on the other hand, the judgment of the state court was final and would support a plea of res judicata. *Wichita Falls & S. R. Co. v. McDonald, 174 S. W. 2d 951 (Tex. 1943).* Appellee cites no authority holding that the judgment of the state court was provisional or temporary or anything less than final, and we believe there are no such authorities. In *Montgomery Building & Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952),* relied on by Appellee, (Motion, p. 3) the Alabama "temporary writ of injunction" was provisional and temporary, and the trial court had continuing jurisdiction and authority to dissolve or modify the temporary decree at any and all times. In the present case, the only court with further jurisdiction or authority over the question herein presented is the Supreme Court of the United States.

Appellee points out (Motion, p. 2) that a judgment appealed from must be "subject to no further review or correction." We agree with this statement. But Appellee seems to infer that the judgment appealed from in the present case is subject to further review or correction. The record in this case clearly negatives this inference. The judgment by the Supreme Court of the State of Texas is a judgment "rendered by the highest court" of Texas "in which a decision could be had." *28 U.S.C. §1257(2).* It is not subject to further review or correction unless such review or correction shall be made by this Court. In any further Texas proceedings the finality of such judgment has to be recognized.

Appellee states (Motion, p. 2) that the "judgment appealed from must be an effective determination of the litiga-

tion." As authority for this statement Appellee cites *Market Street Railway Co. v. Railroad Commission, 324 U. S. 548 (1944)*, and *Arnold v. United States, 263 U. S. 427 (1923)*. The *Market Street Railway Co.* case involved the status of a judgment of the Supreme Court of California between the date of the judgment and the time for filing of a remittitur. In the *Arnold* case the judgment of the Circuit Court of Appeals remanded the cause to the federal district court for trial as to practically all of the issues in the case. Neither of the cited cases is relevant in the present case. In the present case the order has "fully adjudicated rights" and such "adjudication is not subject to further review by a state court". This is the test of finality as announced by this Court in *Gospel Army v. City of Los Angeles, 331 U. S. 543 (1947)*.

Appellee's statement that the judgment appealed from must be an effective determination of "the litigation" does not accurately describe the jurisdictional test declared and applied by this Court. In *Bandini Petroleum Co. v. Superior Court, 284 U. S. 8 (1931)*, the Director of Natural Resources of California had brought suit in the Superior Court of the State of California to enjoin alleged unreasonable waste of natural gas under the California conservation act. Bandini Petroleum Co. sought a writ of prohibition from the District Court of Appeal. Overruling the federal grounds urged by Bandini, the District Court of Appeal denied the writ of prohibition. The Supreme Court of California denied review. This Court held that it had jurisdiction at that stage of the case to review the determination of federal questions entering into the judgment of the state court denying the writ of prohibition. This Court pointed out that it was this "determi-

nation alone that we can now consider". Clearly in this *Bandini* case the judgment denying the writ of prohibition did not result in any ultimate determination of the entire "litigation", but this Court nevertheless had jurisdiction of the federal questions on appeal. The instant case presents a striking parallel to the *Bandini* case, the state court from which this appeal is taken having finally determined that the federal statute *(12 U. S. C. §94)* did not apply to proceedings against national banks in state courts; and it is this determination alone that Appellant is asking this Court to consider. Appellant respectfully submits that under this Court's ruling in the *Bandini* case there is jurisdiction in this Court to review the judgment of the Texas court from which this appeal has been taken.

Appellee further contends that for this Court to take jurisdiction of the appeal in the present case would "militate against the rules heretofore laid down by this Court respecting piecemeal review". (Motion, p. 3.) We respectfully urge that this position of Appellee is not well taken. It is clear in this case that there has been a final adjudication by the Texas court of the federal right asserted by Appellant, and that such federal right will not be involved in any subsequent proceedings in this cause. Appellee's pleading does not suggest that his state court action based on state law would involve any further federal question as to Appellant, and we know of none ourselves. Under the ruling of this Court in the *Bandini* case this Court's assumption of jurisdiction will in no way violate any rule against fragmentary or piecemeal review.

Appellee further argues that this Court's assumption of jurisdiction would violate this Court's policy "against premature constitutional adjudication". This argument is based necessarily on the erroneous premise that the issue is premature now but could be mature or ripe at a later stage. Further proceedings can have no bearing on the maturity or ripeness of the appealed issue, which has been finally adjudicated. Appellee does not argue and can not argue that the state trial court would have the right to alter in any way the final adjudication of the issue. The judgment of the Supreme Court of Texas and its opinion in this case leave no doubt as to the unconditional finality of the adjudication.

Appellee's argument that Appellant might not complain at a later stage if the trial court held in its favor on the merits overlooks the fundamental premise that Appellant would still have lost its valuable federal right as to which there has been a final adjudication. In the *Bandini* case Bandini Petroleum Co. might have prevailed on the merits in the proceeding in the Superior Court of California, but this possibility did not prevent this Court from taking jurisdiction to determine whether or not the Superior Court of California had any right to proceed with the trial on the merits.

We recognize the statutory and judicial policy which prohibits appeals from any decisions which are tenative, informal, or incomplete. But even in the light of this policy we urge the applicability of the exceptional rule declared by this Court in *Cohen v. Beneficial Industrial Loan Corp.*,

337 U. S. 541 (1949). In the *Cohen* case this Court considered the meaning of "final decisions" as used in the related Section 1291 of the Judicial Code. *28 U. S. C. §1291.* The defendant had moved in the district court to require the plaintiff to post security for costs including reasonable attorneys' fees. The district court denied this motion, and the court of appeals reversed. This Court took jurisdiction and affirmed the opinion of the court of appeals. With respect to the appealability of the judgment this Court stated:

> "We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. * * *.
>
> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

These considerations are particularly applicable in the present case. Neither the Texas statute involved nor the federal statute involved in the present case has anything to do with the merits of the case. The right claimed by Appellant on the basis of the express federal statute *(12 U. S. C. §94)* was not an ingredient of the cause of action, or the defenses to it. The claimed federal venue right is separable

from and collateral to the rights asserted in the action. There can be no consideration of such claimed right in connection with the trial of the merits of the action. The order appealed from is a final refusal of the duly claimed right. Appellant's claimed right, aptly, is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

WHEREFORE, Appellee's Motion to Dismiss Appeal should be overruled, and probable jurisdiction should be noted herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on June 26, 1961, I served copies of the foregoing Brief in Opposition to Appellee's Motion to Dismiss Appeal on the Appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee at the following post office addresses:

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